Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1813

SAMUEL H. SLOAN,

Petitioner,

against

FRANK G. RAICHLE, CHEMICAL BANK, CHASE MANHATTAN BANK, FIRST NATIONAL BANK OF CHICAGO, MARINE MIDLAND BANK, LINCOLN FIRST BANK OF ROCHESTER, THE TRAVELER'S INDEMNITY CO., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CHEMICAL BANK

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Of Counsel

June 29, 1979

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Respondent Chemical Bank ("Chemical") respectfully prays that this Court deny the petition for a writ of certiorari seeking review of orders of the United States Court of Appeals for the Second Circuit ("Second Circuit") dated December 12, 1978 and March 6, 1979.

Statement of the Case

Stirling Homex Corporation ("Homex") filed a petition for reorganization under Chapter X of the Bankruptcy Act on July 12, 1972 in the United States District

Court for the Western District of New York ("District Court"). Thereafter, Frank G. Raichle, was appointed as Reorganization Trustee of Homex (the "Trustee"). On June 13, 1977, United States District Judge Harold P. Burke, after an evidentiary hearing on notice to creditors and stockholders of Homex, entered an order and judgment (i) finding Homex to be insolvent to the extent of almost $30,000,000.00, (ii) directing that a plan of reorganization in the nature of an orderly liquidation be filed and (iii) holding that shareholders of Homex could not vote on the plan (the "insolvency order") (Appendix I, pp. 17a-18a).*

On August 29, 1977 petitioner Samuel H. Sloan, *pro se* ("Sloan"), a speculator in the stock of Homex who only purchased after the Chapter X petition had been filed, appealed from, *inter alia,* the insolvency order. Chemical moved to dismiss the appeal. On October 25, 1977, the Second Circuit granted Chemical's motion and the Sloan appeal was dismissed for lack of jurisdiction, without prejudice to any motions made by Sloan in the District Court.

On September 29, 1977, Sloan filed a motion in the District Court seeking an order, *inter alia,* vacating the insolvency order. He alleged that his non-appearance at the earlier hearing was due to his failure to receive notice of the hearing since he had moved from the address to which the notice had been sent. Affidavits in opposition to Sloan's motion were filed by the Trustee and Chemical. A hearing on the motion was held on February 16, 1978, and on that date Judge Burke denied Sloan's motion to vacate finding (i) notice was properly given to all stockholders and (ii) Sloan had not shown any basis for concluding that if the

* Hereafter, references to the Petition will be cited as "P" followed by the appropriate page; references to the Appendices to the Petition will be cited to the appropriate page followed by the letter "a".

insolvency order was vacated and a new hearing held, a different result would obtain (the "February 16, 1978 order") (5a-7a).

Sloan appealed from the February 16, 1978 order to the Second Circuit. The Trustee moved to dismiss the appeal as frivolous. Affidavits and a brief in support of the motion to dismiss were filed by the Trustee and Chemical and an affidavit in opposition to the motion, containing legal citations, was filed by Sloan. Oral argument was had on the motion to dismiss before a three-judge panel on December 12, 1978. Following argument, the Second Circuit dismissed the appeal on the merits (the "dismissal order") (2a-3a). Sloan then moved in the Second Circuit for rehearing and for rehearing en banc, which motions were denied on March 6, 1979 (3a-5a). This petition for a writ of certiorari followed.*

Reasons for Denying the Writ

The petition does not involve an important question of law and the Second Circuit clearly was correct in its decisions.

The statements made by Sloan in the petition are so intemperate and varied that it is easy to lose sight of the issue that was before the Second Circuit. Sloan moved in the District Court to vacate the insolvency order previously entered by Judge Burke after an evidentiary hearing on notice to all stockholders and creditors of Homex. In the February 16, 1978 order, Judge Burke denied Sloan's motion to vacate and it was from that order that Sloan appealed to the Second Circuit. As such, the issue before

* Sloan has also moved, by motion dated June 4, 1979 for reargument in the Second Circuit. This Court should be aware that a petition for a writ of certiorari in the related matter of *Gregory Jezarian et al.* v. *Frank G. Raichle, Reorganization Trustee, et al.,* No. 78-869 was denied by this Court on January 8, 1979.

the Second Circuit on the appeal was the narrow question of whether the District Court abused its discretion in declining to vacate the insolvency order. *Schwarz* v. *United States,* 384 F.2d 833 (2d Cir. 1967); *Parker* v. *Broadcast Music Inc.,* 289 F.2d 313 (2d Cir. 1961).

Hundreds of stockholders were given notice of the hearing held before Judge Burke with regard to the Trustee's application to have Homex adjudicated insolvent. At the hearing, representatives of stockholders appeared and participated. The Trustee testified with regard to the financial condition of Homex and detailed financial statements prepared by the Trustee's accountants were introduced into evidence. The testimony and documents conclusively established that the liabilities of Homex exceeded its debts by almost $30,000,000. No party filed an answer to the Trustee's application or objected at the hearing to the testimony and evidence adduced.

In requesting the District Court to vacate the insolvency order, Sloan wholly failed to allege any determinative facts which he would bring to the Court's attention to show that Homex was not insolvent in the event that the insolvency order were vacated. In short Sloan entirely failed to submit, as required, an affidavit of merit, *Madsen* v. *Bumb,* 419 F.2d 4 (9th Cir. 1969); *Rutland Transit Company* v. *Chicago Tunnel Terminal Company,* 233 F.2d 655 (7th Cir. 1956); *Residential Reroofing Union Local 30-B, etc.* v. *Mezicco,* 55 F.R.D. 516 (E.D. Pa. 1972). Absent such a showing by Sloan in the papers before the District Court, there would have been no purpose whatsoever served in vacating the insolvency order since on a new hearing, the proof, and therefore the outcome, would be the same. Accordingly, the District Court properly denied Sloan's motion.

It is in this context that the Second Circuit's dismissal order must be viewed. After Sloan filed his notice of appeal to the Second Circuit, the Trustee, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule

27 of the Rules of the Second Circuit, moved to dismiss the appeal on the merits as being frivolous. It should be noted that concurrently with the motion, Sloan's then counsel moved for leave to withdraw on the ground that he believed that the appeal was without merit. Extensive papers were submitted by all parties in connection with the motion to dismiss which was granted after oral argument (2a-3a). Under these circumstances, the Second Circuit acted properly in dismissing the appeal.

In his petition Sloan raises several other matters that should briefly be addressed. Reference is made to a settlement between the Trustee and the bank lenders to Homex as being made without notice to stockholders (P 15 n.3). This statement is false. Full and complete hearings were held before both Bankruptcy Judge Edward D. Hayes and the District Court with respect to whether the settlement should be approved. The hearing before Bankruptcy Judge Hayes was held on notice to all stockholders and creditors, the Securities and Exchange Commission and other interested parties. Notice of the hearing before the District Court was given to all parties who had appeared at the hearing before Bankruptcy Judge Hayes.

On May 14, 1976, Bankruptcy Judge Hayes filed Findings of Fact and Recommendation that the proposed settlement be approved. On June 29, 1976, Judge Burke signed an order approving the proposed settlement. No objection was raised by anyone to the settlement at either hearing and no appeal was ever taken from Judge Burke's order.

Sloan's petition also contains a wholly improper attack on the integrity of Circuit Judge Timbers, including the statement that he believes that Judge Timbers "may have personally erased the tape" of the argument before the Second Circuit (P 13-14). That the tape of the oral argument in inaudible is regrettable, but only that. The tapes are intended principally for the use of the judges

of the Second Circuit and not for litigants. A party wishing to have a transcript of an oral argument before that court retains a court reporter for that purpose. This was, of course, not done by Sloan and it ill behooves him to now complain of the absence of a transcript. Indeed, the lack of merit in this petition is graphically illustrated by the very excesses contained therein.

Conclusion

This Chapter X proceeding has been pending for almost 6½ years. The Trustee has advised the District Court that he has completed the difficult process of liquidating the assets of the estate and has submitted to that court a plan of reorganization in the nature of liquidation. Sloan's petition is a principal stumbling block to the final resolution of this Chapter X proceeding.

As has been demonstrated, this petition for a writ of certiorari is frivolous and accordingly, it should be denied.

Dated: New York, New York
June 29, 1979

Respectfully submitted,

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